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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DESMOND A. HENRY, Defendant and Appellant.	B265564 & B269406 Los Angeles County Super. Ct. No. MA063882

APPEAL from a judgment of the Superior Court of Los Angeles County, Frank M. Tavelman, Judge. Reversed in part affirmed in part, and remanded with directions.

Roberta Simon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and Michael C. Keller, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Desmond A. Henry was convicted of six offenses related to the late-night robbery and beating of a shop owner. On appeal, defendant contends that there is insufficient evidence he acted for a sadistic purpose; that there is insufficient evidence to support the court's conclusion defendant was competent to stand trial; and that we must strike his conviction for battery with serious bodily injury (count 8) because it is a lesser-included offense of simple mayhem (count 9). Defendant also asks us to review the in camera proceedings conducted by the trial court pursuant to his motion for production of documents under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) and to review the restitution proceedings under the procedures in *People v. Wende* (1979) 25 Cal.3d 436.

We hold there is insufficient evidence that defendant acted with the specific intent required for torture, and reverse that count, but conclude the sentence imposed for count 8, the *Pitchess* hearing, and the restitution proceedings were all proper. We also conclude there was sufficient evidence to support the court's competency determination. Finally, we direct the court to correct the abstract of judgment and the minute orders of July 6, 2015 and July 17, 2015.

PROCEDURAL BACKGROUND

The People charged defendant by information with attempted murder (Pen. Code, § 664/187, subd. (a); count 1);[1] robbery (§ 211; count 2); commercial burglary (§ 459; count 3); possession of methamphetamine (Health & Saf. Code, § 11377,

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1 All undesignated statutory references are to the Penal Code.

subd. (a); count 4); aggravated mayhem (§ 205; count 5); torture (§ 206; count 6); assault with force likely to cause great bodily injury (§ 245, subd. (a)(4); count 7); battery with serious bodily injury (§ 243, subd. (d); count 8); and simple mayhem (§ 203; count 9).[2] As to counts 1, 2, and 5, the People alleged that defendant personally inflicted great bodily injury (§ 12022.7, subd. (a)) on a victim who was at least 70 years old (§ 12022.7, subd. (c)). As to counts 6, 7, and 8, the People alleged that defendant personally inflicted great bodily injury (§ 12022.7, subd. (c)).[3] The information also alleged defendant had two prior convictions. One conviction was alleged as a strike prior, a serious-felony prior (§ 667, subd. (a)(1)), and a prison prior (§ 667.5, subd. (b)). The other conviction was alleged as a prison prior (§ 667.5, subd. (b)). Defendant pled not guilty and denied the allegations.

Before trial, defense counsel expressed a doubt about defendant's competence based on a suspected intellectual disability. The trial court suspended criminal proceedings and appointed Dr. Timothy Collister, a designee of the regional center director, to examine him. Collister concluded defendant was

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[2] On September 3, 2014, the People charged defendant by information with counts 1 through 4 and their related allegations. On November 17, 2014, over defense objection, the People added counts 5 and 6 and their related allegations by first amended information. Just before trial, on June 16, 2015, the People added counts 7 and 8 by interlineation, again over defense objection, and dismissed count 4. During trial, on June 29, 2015, the People again amended the information by interlineation to add count 9.

[3] As to counts 2, 5, and 8, the People also alleged that the victim was at least 60 years old (§ 1203.09, subd. (f)), but that allegation was not submitted to the jury.

incompetent to stand trial. Two doctors who were not regional center designees—Dr. Sanjay Sahgal and Dr. Kory Knapke—also evaluated defendant; they found him competent to stand trial. The issue of defendant's competence was submitted for decision based on the reports submitted by the three doctors; the court ruled defendant was competent and reinstated proceedings. At trial, Dr. Catherine Scarf testified as an expert in developmental disabilities. She diagnosed defendant with borderline intellectual function. During trial and sentencing, defense counsel moved to suspend proceedings again; counsel pointed to specific instances in which defendant had been unable to understand the proceedings or assist in his defense. Each time, the court concluded there were no changed circumstances and declined to declare a doubt about defendant's competency.

After a bifurcated trial at which he did not testify, the jury convicted defendant of counts 2, 3, and 6 through 9. The jury acquitted defendant of count 5 (§ 205; aggravated mayhem) and its lesser-included offense,[4] and failed to reach a verdict on count 1 (§ 664/187, subd. (a); count 1).[5] After the bifurcated portion of the trial, the jury found both prior convictions true.

The court denied defendant's motion to strike his prior convictions and sentenced him to 35 years to life. The court selected count 2 (§ 211; robbery) as the base term and sentenced defendant to a determinate term of 21 years—the upper term of five years doubled for the strike prior, plus five years for the

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[4] The minute order of July 6, 2015 incorrectly states that the jury found defendant guilty of the lesser-included offense.

[5] The court declared a mistrial on count 1, and the prosecution later dismissed the charge.

great-bodily-injury enhancement (§ 12022.7, subd. (c)), five years for the serious felony prior (§ 667, subd. (a)), and one year for the prison prior (§ 667.5, subd. (b)), to run consecutively. The court stayed the remaining enhancement under section 654. The court sentenced defendant to an indeterminate term of life in prison for count 6 (§ 206; torture), to run consecutively to count 2, with a minimum parole term of 14 years—seven years, doubled under section 1170.12. The court struck the related enhancements. Finally, the court stayed counts 3, 7, 8, and 9 under section 654 and struck their related enhancements.

Defendant filed a timely notice of appeal, which we assigned case no. B265564. After a contested restitution hearing, defendant filed a second timely notice of appeal, which we assigned case no. B269406. On defendant's motion, we consolidated the two appeals for purposes of oral argument and decision.

FACTUAL BACKGROUND

1. Prosecution evidence

Around midnight on August 6, 2014, defendant threw a brick through the window of a clothing business, Butterfly Boutique, at 1647 East Palmdale Blvd. in Palmdale. After looking around outside, defendant walked through the broken window into the store, where he was confronted by the proprietor, John Reid. The two men briefly stood and faced each other; Reid told defendant to leave. In response, defendant punched him in the face; Reid fell to the floor. Reid tried repeatedly to get up; each time, defendant kicked him in the head. Defendant ultimately kicked him more than a dozen times.

After subduing Reid, defendant went into an office in the back of the store and emerged with approximately $1,000 in cash that Reid had placed on a desk earlier that night. As defendant left the store, Reid began to get up again; defendant kicked him in the face one more time. Surveillance cameras inside the boutique captured the attack. The entire incident lasted about 90 seconds.

After defendant left, Reid realized he was losing a lot of blood and called 911. His face was bloody and swollen, and he had dried blood on his shirt and hands. Reid sustained a number of facial fractures, a laceration between his eyebrows, and damage to his hearing.

Reid described his attacker as an African-American male with an athletic build wearing a black tank top and black shorts. Several hours later, authorities searching the area saw defendant in a parking lot a few blocks away. He was wearing clothing that matched the description given by Reid and depicted on the surveillance videos. Police detained him. Defendant had dried blood on his shoes, socks, and shirt. The blood matched Reid's DNA. Reid later identified defendant from a six-pack photo array.

Defendant gave a statement to the police. At the outset of the interview, defendant provided his correct date of birth. He indicated that he understood his constitutional rights to remain silent and to have an attorney appointed prior to any questioning, but he never expressly waived those rights.[6] The police then

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[6] The defense does not argue on appeal that defendant's statement should have been excluded under *Miranda v. Arizona* (1966) 384 U.S. 436.

asked defendant about the robbery. He denied that he was involved. He explained that he got blood on his shoes when he cut himself on a skateboard earlier that day. He said he hurt his hand hitting a window at his house, and that the red material on his thumb was Hot Cheetos, not dried blood.

2. Defense evidence

Defendant's mother, Patricia, testified that defendant had always been "slower" mentally than other children and had been placed in special education classes by the fourth grade. Patricia estimated defendant had the mental development of an 11- or 12-year-old child. She testified that defendant always had a tendency to smile or laugh at inappropriate times, a trait also noted by his lawyer and by the court. Although Patricia had not personally seen defendant use drugs, she suspected that he was using marijuana in 2014, and that it made him even slower mentally.

Defendant's sister Brittany also testified that he was slower than his classmates. Brittany explained that defendant regularly stared or zoned out during conversations; he had a habit of smiling or laughing at inappropriate times. According to Brittany, defendant began acting disobediently and violently toward his family in 2014.

Psychologist Catherine Scarf examined defendant. She testified that any IQ under 70 was in the deficient range and could result in a diagnosis of mental retardation—now called intellectual disability.[7] Defendant had an IQ of 67. Though Scarf

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[7] Since "IQ measures are less valid in the lower end of the IQ range[,]" the DSM-5 cautions that "various levels of severity are defined on the basis of adaptive functioning, and not IQ

diagnosed defendant with borderline intellectual functioning—one level above the deficient range—she suspected defendant had mild mental retardation. Scarf also testified that a person with borderline intellectual function was capable of making goal-oriented decisions.

DISCUSSION

On appeal, defendant contends that he was incompetent to stand trial, that there was insufficient evidence he possessed the specific intent required for torture (count 6), and that battery with serious bodily injury (count 8) is a lesser-included offense of mayhem (count 9). He also asks that we review the in camera proceedings conducted by the trial court pursuant to his motion for production of documents under *Pitchess*, *supra*, 11 Cal.3d 531 and that we independently review the restitution proceedings under the procedures in *People v. Wende*, *supra*, 25 Cal.3d 436.

1. Competency

Defendant argues there is insufficient evidence that he was competent to stand trial because at his pretrial competency hearing, the court did not accord sufficient weight to the assessment conducted by the regional center designee. Defendant also argues the court should have declared a second doubt about his competency based on his trial conduct and Scarf's testimony.

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scores[.]" (American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) p. 33 (hereafter DSM-5).)

1.1. Incompetence based on intellectual disability

A criminal defendant "may not be put to trial unless he ' "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding … [and] a rational as well as factual understanding of the proceedings against him." ' [Citation.]" (*Cooper v. Oklahoma* (1996) 517 U.S. 348, 354.) In California, that protection is embodied in section 1367, subdivision (a), which provides: "A person cannot be tried or adjudged to punishment … while that person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder *or developmental disability*, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (Italics added.) One form of developmental disability is intellectual disability—formerly called mental retardation.[8]

Section 1368 implements these principles by providing that if a doubt arises in a judge's mind about the defendant's competence, the court must suspend proceedings while the question is resolved. (§ 1368, subd. (a).) Doubt is an objective standard; even if the court does not personally believe a defendant may be incompetent, it must suspend proceedings when presented with substantial evidence giving rise to such a

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[8] " '[D]evelopmental disability' means a disability that originates before an individual attains age 18, continues, or can be expected to continue, indefinitely and constitutes a substantial handicap for such individual. … [T]his term shall include intellectual disability, cerebral palsy, epilepsy, and autism." (§ 1370.1, subd. (a)(1)(H); *People v. Leonard* (2007) 40 Cal.4th 1370, 1387–1388 (*Leonard*); see Prob. Code, § 1420 [intellectual disability is a form of developmental disability].)

doubt. (*People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 69; see *People v. Hale* (1988) 44 Cal.3d 531, 540 [where evidence is less than substantial, court retains discretion to order hearing].) A defendant's competence to stand trial is a jurisdictional question that cannot be waived. (*People v. Pennington* (1967) 66 Cal.2d 508, 521.) Thus, if the court proceeds without holding a required competency hearing, the defendant has been deprived of his right to a fair trial, the court has acted in excess of its jurisdiction, and the judgment is a legal nullity. (*Marks*, at pp. 70–71.)

After declaring a doubt about a defendant's competence to stand trial and suspending proceedings, the court must "appoint a psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant." (§ 1369, subd. (a).) If defendant and his attorney seek an incompetence finding, the court need only appoint **one** expert to evaluate him. (Cal. Rules of Court, rule 4.130(d)(1)(A) & Advisory Com. com.) Special procedures govern the evaluation of defendants who may be incompetent due to a developmental disability, however. "If it is suspected the defendant is developmentally disabled, the court shall appoint the director of the regional center for the developmentally disabled … to examine the defendant." (§ 1369, subd. (a).) When read together, these provisions require that in all cases in which the defense seeks an incompetence finding, the court must appoint one expert; where the suspected incompetence may stem from a developmental disability, the one expert must be the director of the regional center. Appointment of additional experts is a matter of discretion.

The Legislature had important reasons to treat the developmentally disabled differently in this context. While it is

not uncommon for developmentally disabled defendants also to be mentally ill, mental illness is *not* a type of developmental disability. As relevant here, mental illness is not closely related to intellectual disability and does not require treatment similar to that required for intellectual disability. (See *In re Williams* (2014) 228 Cal.App.4th 989, 1009–1010 [developmental disability is not a form of "mental disorder"].) Because "[d]evelopmentally disabled persons have very different treatment needs than the mentally disordered[]" (Frank Lanterman, letter of intent to Gov. Brown re: Assem. Bill No. 1722 (1977–1978 Reg. Sess.) Sept. 8, 1977), "appointment of the director of the regional center for the developmentally disabled (§ 1369, subd. (a)) is intended to ensure that a developmentally disabled defendant is evaluated by experts experienced in the field, which will enable the trier of fact to make an informed determination of the defendant's competence to stand trial." (*Leonard*, *supra*, 40 Cal.4th at p. 1391.)

Here, the court appointed Collister, the regional center designee, to examine defendant and thereby complied with the part of section 1369 dealing with intellectual disability. At the prosecution's urging, it *also* exercised its discretion to appoint Sahgal and Knapke, two mental health experts on the standard superior court list. On appeal, defendant initially appeared to argue that the court erred by appointing Sahgal and Knapke to evaluate defendant because neither has any apparent expertise in intellectual disabilities. In response to this court's questions at oral argument, however, the defense clarified its position. It seems defendant does not contend that the court erred in

appointing Sahgal or Knapke to evaluate him.[9] Instead, he appears to argue that the trial court abused its discretion by failing to give sufficient weight to Collister's opinion of defendant's competence.

1.2. Substantial evidence supports the court's competency finding.

"A defendant is presumed competent unless the contrary is proven by a preponderance of the evidence. [Citations.] On appeal, the reviewing court determines whether substantial evidence, viewed in the light most favorable to the verdict, supports the trial court's finding. [Citation.] 'Evidence is substantial if it is reasonable, credible and of solid value.' [Citation.]" (*People v. Lawley* (2002) 27 Cal.4th 102, 131 (*Lawley*).)

The People argue, and the defense apparently agrees, that the Knapke and Sahgal appointments did not violate section 1369's requirements for assessing intellectual disability because "Dr. Collister's opinion that [defendant] was incompetent to stand trial was not premised on a developmental disability." Since Collister believed defendant's incompetence "stemmed from a 'mental disorder' under Penal Code section 1370 rather than a developmental disability under section 1370.1," they contend, "there was no need to appoint additional experts who had the type of 'developmental disability' expertise discussed in *Leonard*."

Absent some challenge to Knapke's or Sahgal's expertise, the court was entitled to rely on their opinions notwithstanding the only report from an expert in intellectual disabilities—

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[9] Accordingly, we express no opinion on this issue.

Collister—was to the contrary. (*People v. James* (1989) 208 Cal.App.3d 1155, 1164 [once it is established that a witness has adequate credentials to qualify as an expert, questions about the degree of his or her expertise go to weight, not admissibility].) Accordingly, there is sufficient evidence to support the court's conclusion.

1.3. The trial court was not required to suspend proceedings a second time.

"When, at any time prior to judgment, a trial court is presented with substantial evidence of a defendant's incompetence to stand trial, due process requires a full competency hearing. [Citation.]" (*Lawley*, *supra*, 27 Cal.4th at p. 136.) When a competency hearing has already been held and the defendant has been found competent to stand trial, however, the court is not required to hold a second competency hearing unless it is presented with a substantial change of circumstances or with new evidence that casts a serious doubt on the validity of the initial competency finding. (*People v. Taylor* (2009) 47 Cal.4th 850, 863–864.)

Although the court below declared a doubt, suspended proceedings, and appointed Collister based on suspected intellectual disability, not mental illness, the defense conceded at oral argument that Collister's finding of incompetency was based on mental illness. The defense repeatedly explained that while Collister conducted extensive intellectual testing, he "found that per se there was not a developmental disability." Though counsel speculated that "intellectual disability must have come into [Collister's] thinking somehow," ultimately, "Collister focused on the psychosis because the defendant did not meet the testing

standards for a developmental disability." Scarf's trial testimony must be viewed against this backdrop.

At trial, Scarf testified at length about defendant's intellectual functioning, which she assessed forensically. She diagnosed defendant with Borderline Intellectual Functioning under the DSM-5—a form of intellectual disability formerly called mild mental retardation—but unlike Collister, she did not believe defendant had significant psychiatric symptoms. While Scarf's conclusions point to a more serious intellectual deficit than Collister identified, she did not opine on defendant's competency to stand trial. (*People v. Mai* (2013) 57 Cal.4th 986, 1032–1033.) Scarf's information was certainly new, but it was not different *enough* from Collister's to constitute new evidence that casts a serious doubt on the validity of the prior competency finding. (See *Lawley*, *supra*, 27 Cal.4th at pp. 136–137 [second hearing not required where new evidence involved manifestation of same arguably delusional beliefs evaluated in prior hearing].)

Defendant also points to new evidence of his inability to cooperate rationally with counsel. For example, there is evidence that defendant did not understand the significance of his prior convictions, and his trial counsel repeatedly protested that defendant was unable to assist in his defense. Under the current state of the law, however, we cannot say as a legal matter that a substantial change of circumstances or new evidence raised a serious doubt about the validity of the court's prior findings.[10]

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[10] This conclusion, of course, is based on the current state of the law in California. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.) We note, however, that on December 14, 2016, the California Supreme Court granted review of this court's unpublished opinion in *People v. Rodas*, review granted Dec. 14, 2016, S237379, on

(*People v. Mai*, *supra*, 57 Cal.4th at p. 1033 [counsel's belief in a client's incompetence is entitled to some weight but does not, without more, require the court to hold a competency hearing].)

2. Sufficiency of the evidence of torture

A criminal defendant may not be convicted of any crime unless the prosecution proves every fact necessary for conviction beyond a reasonable doubt. (U.S. Const., 5th Amend.; U.S. Const., 14th Amend.; see Cal. Const., art. I, §§ 7, 15; *In re Winship* (1970) 397 U.S. 358, 364; *Jackson v. Virginia* (1979) 443 U.S. 307, 316.) This principle is so fundamental to the American system of justice that criminal defendants are always "afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts." (*United States v. Powell* (1984) 469 U.S. 57, 67.)

Defendant argues there is insufficient evidence that he possessed the specific intent required to sustain a conviction for torture (§ 206; count 6). We agree.

2.1. Standard of review

In assessing the sufficiency of the evidence, we review the entire record to determine whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such

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the following question: Did the trial court violate defendant's right to due process by failing to suspend proceedings after his attorney declared a doubt about his competence?

that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Ibid*.)

In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) The same standard applies where the conviction rests primarily on circumstantial evidence. (*People v. Thompson* (2010) 49 Cal.4th 79, 113.) We may not reweigh the evidence or resolve evidentiary conflicts. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) In light of these principles, we may not reverse for insufficient evidence unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Deference is not abdication, however, and substantial evidence is not synonymous with *any* evidence. " 'A decision supported by a mere scintilla of evidence need not be affirmed on appeal.' [Citation.] Although substantial evidence may consist of inferences, those inferences must be products of logic and reason and must be based on the evidence. Inferences that are the result of mere speculation or conjecture cannot support a finding. The ultimate test is whether a reasonable trier of fact would make the challenged ruling considering the whole record. [Citation.]" (*In re James R.* (2009) 176 Cal.App.4th 129, 135; Evid. Code, § 600, subd. (b) ["An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action."].)

2.2. Torture requires the infliction of pain or suffering for an enumerated purpose.

To convict a defendant of violating section 206, the People must prove the following elements beyond a reasonable doubt:

- The defendant inflicted great bodily injury;
- When inflicting the injury, the defendant intended to cause cruel or extreme pain and suffering; *and*
- Defendant intended to cause the pain *for the purpose of* revenge, extortion, persuasion, or for any sadistic purpose.

(§ 206; see CALCRIM No. 810.)

It is not the victim's suffering or the amount of pain inflicted that distinguishes torture from a vicious beating. (*People v. Barrera* (1993) 14 Cal.App.4th 1555, 1569.) "Rather, it is the state of mind of the torturer—the cold-blooded intent to inflict pain for personal gain or satisfaction—which society condemns." (*People v. Steger* (1976) 16 Cal.3d 539, 546.) Focusing on "the duration of the pain experienced or the manner in which it was inflicted incorrectly shifts the emphasis from the perpetrator." (*Barrera*, at p. 1564.)

Thus, while the circumstances surrounding a beating "may be used to support the inference that the defendant had the requisite intent, [the Supreme Court has long] cautioned against giving undue weight to the severity of the victim's wounds, as horrible wounds may be as consistent with" violence inflicted "in the heat of passion, in an 'explosion of violence,' " rather than for one of the calculated reasons enumerated by statute. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1239; see *People v. Steger*,

supra, 16 Cal.3d at p. 544 [criticizing appellate courts that "have inferred the presence of 'specific intent to cause cruel suffering' almost exclusively from the severity of the wounds on the victim's body"]; *People v. Tubby* (1949) 34 Cal.2d 72, 76–77 [beating a frail, elderly, unarmed victim beyond recognition insufficient to establish sadism where "the record is devoid of any explanation of why the defendant might have desired his [victim] to suffer."].)

Certainly, as the People argue, there was sufficient evidence for the jury to infer that defendant intended to inflict cruel or extreme pain. But that is only half of the test. To convict a defendant of torture, the People must also prove that the defendant inflicted extreme pain *for a purpose* listed in the statute—i.e., revenge, extortion, persuasion, or any sadistic purpose. (*People v. Pre* (2004) 117 Cal.App.4th 413, 419, 420, 423, 424 (*Pre*) [statute's focus is defendant's intent, not the duration of the attack or the severity of the injuries].) Here, the prosecution argued that defendant acted with a sadistic purpose. As we will discuss, however, the People have not pointed to facts from which a jury could reasonably infer that defendant acted for sadistic pleasure rather than some other objective.

2.3. There is insufficient evidence of sadistic intent.

"As used in the statute, 'sadistic purpose' encompasses the common meaning, i.e., ' "the infliction of pain on another person for the purpose of experiencing pleasure." ' [Citation.]" (*Pre*, *supra*, 117 Cal.App.4th at p. 420.) Thus, in *People v. Healy*, there was sufficient evidence of sadism where the defendant seemed content each time he brutally beat his longtime girlfriend. (*People v. Healy* (1993) 14 Cal.App.4th 1137, 1142–1143.) In *Pre*, there was sufficient evidence of sadism where the defendant's

bizarre actions had both sexual overtones and no other reasonable purpose. (*Pre*, *supra*, 117 Cal.App.4th 413.)

Here, there was no evidence that defendant sought or derived pleasure from his violent conduct. Though three witnesses testified about their interactions with the defendant or the victim during and after the crime, no one indicated or implied that defendant derived any pleasure or contentment from the attack. Nor can we glean evidence of satisfaction or arousal from the interview transcript or the surveillance video, which lack any indicators of such a mental state.

To be sure, even absent direct or circumstantial evidence pointing to a sadistic purpose, we may still infer intent by process of elimination. (*Pre*, *supra*, 117 Cal.App.4th at pp. 420–421.) In *Pre*, the defendant forced his way into the victim's home, beat her, and stole her purse. (*Id.* at pp. 417–418.) The court acknowledged that "various intents could be ascribed to [the defendant's] initial entry and attack," but concluded that "once he had subdued [the victim] by choking her into unconsciousness, a reasonable jury could have concluded that his subsequent use of force was not pursuant to a need to subdue [the victim] as part of a belief in the need for self defense or pursuant to a robbery." (*Id.* at p. 422.) Critical to the court's conclusion was the fact that defendant moved the victim, cradled her head and shoulders in his lap, and then bit (and nearly severed) her ear *while she was unconscious*. (*Id.* at pp. 422–424.) The court noted this was "bizarre conduct" supporting an inference of sadistic pleasure. (*Id.* at p. 422.) The court also noted that defendant could not have been mistaken about whether the victim was awake because when she regained consciousness, he choked her until she passed out a second time. (*Ibid.*)

At oral argument, the People suggested we could find sadistic intent in this case by ruling out every other possible intent. They posited that while someone might kick a conscious victim to rob him, to escape after robbing him, or to prevent him from reporting the robbery, those motivations could not apply here because the victim in this case was "completely incapacitated, unconscious" when defendant kicked him for the last time.[11] The People are mistaken.

Reid, who had resisted throughout the robbery, was not only conscious as defendant left the store, but had also placed himself between defendant and the door and was standing up. As the People implicitly acknowledge, these circumstances support the inference that defendant kicked Reid in an effort to incapacitate him while defendant escaped, not because defendant derived pleasure from the last kick. Indeed, this failure to knock

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[11] When asked to identify the evidence from which the jury could infer defendant intended to experience pleasure, the People responded, "I think that's just an inference that one can draw … if we can rule out all other reasons for doing such. In other words, one reason to kick someone is to prevent them from stopping you from what you're trying to do, be it a robbery, be it escape from a robbery, be it reporting. Whatever it is." The People argued we could rule out those possibilities here because "with the victim lying on the floor completely incapacitated, unconscious, as [defendant's] walking out the door, he decides to go ahead and give him another good kick to the face."

The prosecutor made a similar argument below when he described Reid as "laying on the floor" and "hardly moving at all." Then, in his rebuttal argument, the prosecutor compared defendant to a Taliban fighter launching rockets at the prosecutor and his fellow American soldiers on Christmas Day. The jury could infer sadistic intent from the 15th kick, he argued, because there was no other possibility. "It's like the third [Taliban] rocket hitting the building."

Reid unconscious led to defendant's apprehension after Reid called 911.

Other uncontroverted evidence also undermines the reasonableness of inferring a sadistic intent. (See, e.g., *People v. Sanford* (2017) 11 Cal.App.5th 84, 94–95 [court must review sufficiency in light of the whole record and should not affirm based on isolated evidence torn from context].) Defendant had no personal motive to batter Reid; they had never met. (*People v. Burton* (2006) 143 Cal.App.4th 447, 453 [revenge].) Nor did defendant set out that night with a violent agenda; there was no reason for him to expect to find someone sleeping in a dark store at midnight on a Wednesday. The blows were not slow or deliberate—a factor that might indicate the perpetrator savored the violence. (*People v. Proctor* (1992) 4 Cal.4th 499, 531–532.) To the contrary, the entire robbery and beating lasted just 90 seconds. And while none of this evidence points to sadistic intent, it **is** consistent with law enforcement's theory that defendant was focused on stealing money to feed his methamphetamine habit—and that he may have been under the influence of the drug during the robbery. (*People v. Tubby*, *supra*, 34 Cal.2d at p. 78 [insufficient evidence of torture where defendant beat his stepfather to death for no discernable reason because "the unprovoked assault was an act of animal fury produced when inhibitions were removed by alcohol."].)

After reviewing the entire record in this case, we conclude there is no substantial evidence that defendant acted *for the purpose of* sadistic pleasure. One might, of course, speculate that defendant harbored such a particularized intent. For example, it is possible defendant thought it would be fun to kick Reid a 15th time, as the prosecution has suggested. But possibility is mere

speculation—and "speculation is not evidence, less still substantial evidence." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1081; see *People v. Davis* (2013) 57 Cal.4th 353, 360 ["A finding of fact must be an inference drawn from evidence rather than … a mere speculation as to probabilities without evidence."].) In short, the People have pointed to no evidence from which the jury could infer that it was more likely that defendant acted for a sadistic purpose rather than for some other reason, and have cited no case upholding a torture conviction under circumstances similar to those in this case. Consequently, the fact that defendant kicked Reid in the head as defendant left the store was insufficient to prove sadistic intent beyond a reasonable doubt.

3. Battery with serious bodily injury is not a lesser-included offense of mayhem.

Generally, a criminal defendant may be convicted of (though not punished for) multiple offenses based on a single act or course of conduct. (§ 954; *People v. Ortega* (1998) 19 Cal.4th 686, 692.) However, "California law prohibits convicting a defendant of two offenses arising from a single criminal act when one is a lesser offense necessarily included in the other." (*People v. Montoya* (2004) 33 Cal.4th 1031, 1033.) "In deciding whether an offense is necessarily included in another, we apply the elements test, asking whether ' " 'all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense.' [Citation.]" ' [Citation.] In other words, 'if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' " (*Id.* at p. 1034.)

Under section 203, a defendant commits simple mayhem if he "unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip … ." A defendant inflicts serious bodily injury if he causes "a serious impairment of physical condition. Such an injury may include[, but is not limited to]: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement." (§ 243, subd. (f)(4); see CALCRIM No. 925.)

While mayhem may often involve serious bodily injury, the California Supreme Court has concluded that mayhem does not *require* serious bodily injury. (*People v. Santana* (2013) 56 Cal.4th 999.) For example, a defendant commits mayhem if he slits his victim's nose, ear, or lip—but those injuries do not necessarily result in "protracted loss or impairment of function, require extensive suturing, or amount to serious disfigurement." (*Id*. at p. 1010.) Nor do they necessarily (or even commonly) result in loss of consciousness, concussion, or bone fracture. (§ 243, subd. (f)(4).)

Thus, the court in *People v. Poisson* concluded that under *People v. Santana*, battery with serious bodily injury is not a lesser-included offense of simple mayhem. (*People v. Poisson* (2016) 246 Cal.App.4th 121, 124–125.) We agree that to convict a defendant of battery with serious bodily injury, the People must prove an element not required for a mayhem conviction—namely serious bodily injury. Accordingly, battery with serious bodily injury is not a lesser-included offense of mayhem.

4. There was no *Pitchess* error.

Before trial, defendant filed a motion under Evidence Code section 1043 and *Pitchess*, *supra*, 11 Cal.3d 531, seeking discovery of all "complaints from any and all sources relating to violation of constitutional rights, fabrication of charges, fabrication of evidence, false arrest, perjury, dishonesty, writing of false police reports, and any other evidence of misconduct amounting to moral turpitude …" contained in the personnel records of Deputies Vilanova, Marshall, and Wiemann. The court granted the motion in part, agreeing to inspect the personnel records of Vilanova and Wiemann in the area of "honesty (falsification of reports);" the court denied the motion as to Marshall. The court reviewed the records in camera and found no discoverable information.

Defendant has requested our independent review of the in camera portion of the court's *Pitchess* proceedings to determine whether any discoverable information was withheld. (See generally *People v. Mooc* (2001) 26 Cal.4th 1216.) We have reviewed the sealed reporter's transcript of the in camera portion of the *Pitchess* proceeding and conclude that the court fulfilled its obligations. No further proceedings are required.

5. Restitution was proper.

The court held a restitution hearing in this case on December 9, 2015, after defendant filed his original notice of appeal. The court ordered $28,460 in victim restitution as follows: $13,616 to Reid for medical expenses, $14,597 to Butterfly Boutique for property damage, and $247 to Kimberly Humphrey to pay for an early return plane ticket to deal with exigencies from the aftermath of the robbery. Upon completion of

restitution proceedings, defendant filed a second timely notice of appeal.

On September 1, 2016, defendant's appellate counsel filed a brief in the restitution appeal in which she raised no issues and asked us to review the record independently. (*People v. Wende*, *supra*, 25 Cal.3d 436.) Later that day, we notified defendant that his counsel had failed to find any arguable issues in that case and that he had 30 days to submit by brief or letter any arguments he wished this court to consider. We have not received a response.

We have examined the entire record in case no. B269406 and are satisfied appellate counsel has fully complied with her responsibilities and no arguable restitution issues exist. (*Smith v. Robbins* (2000) 528 U.S. 259, 278–284; *People v. Wende*, *supra*, 25 Cal.3d at p. 443.)

6. The court is directed to correct the minute orders of July 6, 2015 and July 17, 2015 and the abstract of judgment.

"An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) "Courts may correct clerical errors at any time, and appellate courts (including this one) that have properly assumed jurisdiction of cases," may order correction of an abstract of judgment that does not accurately reflect the oral pronouncement of sentence. (*Id.* at pp. 185–188.)

The abstract of judgment for the determinate part of the sentence imposed in this case is inaccurate or incomplete in the following respects:

- It does not indicate that the court stayed count 8 and count 9 under section 654.
- It does not list the total time imposed for the determinate portion of the sentence.
- It incorrectly designates the prison prior as an enhancement under section 667, subdivision (b), which is the statute for prior strikes, rather than under section 667**.5**, subdivision (b), which is the statute for prior prison terms.
- It does not list the fines and fees imposed at sentencing.

The minute orders are incorrect in the following respects:

- The minute order of July 17, 2015 incorrectly denotes the statute governing prison priors as section 667, subdivision (b), rather than section 667**.5** subdivision (b).
- The minute order of July 6, 2015 indicates that the jury found defendant not guilty of count 5, but that it found him *guilty* of the lesser-included offense. In fact, as reflected in the reporter's transcript, the verdict forms, and subsequent pages of the minute order, the jury found defendant **not guilty** of both the greater and the lesser-included offense.

The court shall actively and personally ensure the clerk accurately prepares corrected minute orders for these dates. We are confident that upon resentencing, the court will correctly recalculate defendant's custody credits and that it will " 'actively

and personally [e]nsure the clerk accurately prepares a correct amended abstract of judgment.' " (*People v. Johnson* (2015) 234 Cal.App.4th 1432, 1459; see *People v. Buckhalter* (2001) 26 Cal.4th 20, 29, 37 [resentencing court must recalculate and credit against the modified sentence all actual time the defendant has already served, whether in jail or prison, and whether accrued before or since he was originally committed and delivered to prison custody].)

DISPOSITION

The conviction for count 6 (Pen. Code, § 206) is reversed and the matter is remanded for resentencing. Upon remand, the court may impose any new authorized sentence as to all remaining counts and enhancements, including those formerly stayed under section 654, so it "can exercise its sentencing discretion in light of the changed circumstances." (See *People v. Navarro* (2007) 40 Cal.4th 668, 681; see also *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1259 ["upon remand for resentencing after the reversal of one or more subordinate counts of a felony conviction, the trial court has jurisdiction to modify every aspect of the defendant's sentence on the counts that were affirmed, including the term imposed as the principal term."].) In all other respects, the judgment is affirmed. The court is ordered to ensure the clerk prepares corrected minute orders for July 6, 2015 and July 17, 2015 and an accurate abstract of judgment consistent with this opinion and to send a corrected abstract of judgment to the California Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

ALDRICH, J.